

2011 WL 2198298

Only the Westlaw citation is currently available.
United States District Court,
D. South Carolina,
Anderson/Greenwood Division.

Darren S. SIMMONS, Plaintiff,

v.

Nurse Shelly STOKES; Warden Roland
McFadden; Robin Chavis; Amy Smith; HealthCare
Providers; MD Dr. Sampson; MD Robert Shulze,
Jr.; MD Martin Dommers; MD Jennifer A.
Feldman; Nurse Rainwater; Ms. Martin; Nurse
Ms. Roman; Ms. Fox; SCDC Director of Prisons;
Redfern Miller; Nurse Mr. Jakes Spires; Ms.
Williams; Ms. Spiveys; and Ms. Jacobs,
Defendants.

No. 8:11-cv-00175-RMG-JDA.

|
May 11, 2011.

Attorneys and Law Firms

Darren S. Simmons, Bennettsville, SC, pro se.

Samuel F. Arthur, III, Aiken Bridges Nunn Elliott and
Tyler, Florence, SC, Julius W. McKay, II, Erin Mary
Farrell, McKay Cauthen Settana and Stubley, Shelton
Webber Haile, Richardson Plowden And Robinson, Mark
Steven Barrow, Sweeny Wingate and Barrow, Columbia,
SC, for Defendants.

REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

JACQUELYN D. AUSTIN, United States Magistrate
Judge.

*1 This matter is before the Court on Defendant MD
Martin Dommers's motion to dismiss pursuant to [Rule
12\(b\)\(5\) of the Federal Rules of Civil Procedure](#). [Doc.
68.] Pursuant to the provisions of [Title 28, United States
Code, Section 636\(b\)\(1\)\(B\)](#), and [Local Rule 73.02\(B\)](#)
(2)(d), D.S.C., this magistrate judge is authorized to

review all pretrial matters in cases filed by individuals
proceeding *pro se* and to submit findings and
recommendations to the District Court.

BACKGROUND

Plaintiff, an inmate of the South Carolina Department of
Corrections ("SCDC"), filed this action pursuant to [42
U.S.C. § 1983](#) on January 24, 2011 [Doc. 1] and amended
his Complaint on March 2, 2011 [Doc. 16]. Plaintiff
alleges Defendants have violated his constitutional rights.
[Doc. 1]. On May 6, 2011, Defendant MD Martin
Dommers ("Dommers") answered [Doc. 67] and filed a
motion to dismiss pursuant to [Fed.R.Civ.P. 12\(b\)\(5\)](#) [Doc.
68]. Pursuant to [Roseboro v. Garrison, 528 F.2d 309 \(4th
Cir.1975\)](#), Plaintiff was advised by order filed May 9,
2011, that he had thirty-four (34) days to file any material
in opposition to the motion to dismiss.¹

APPLICABLE LAW

Motion to Dismiss

Under [Rule 12\(b\)\(5\)](#), a defendant can move to dismiss a
complaint where service of process failed to comply with
the requirements of [Rule 4 of the Federal Rules of Civil
Procedure](#). See [Fed.R.Civ.P. 12\(b\)\(5\)](#). [Rule 4\(e\)](#) governs
the service of process upon individuals in the United
States and provides that service may be accomplished by
either (1) delivering a copy of the summons and
complaint to the defendant personally, (2) leaving a copy
of the summons and complaint with a person of suitable
age and discretion then residing at the defendant's home
or usual place of abode, or (3) delivering a copy of the
summons and complaint to an agent authorized by
appointment or by law to receive service of process.
[Fed.R.Civ.P. 4\(e\)](#). [Rule 4\(e\)](#) also provides that service of
process may be accomplished pursuant to the law of the
state in which the district court sits. *Id.* Noncompliance
with [Rule 4](#) does not mandate dismissal where the
necessary parties have received actual notice of a suit and
where they have not been prejudiced by the technical
defect in service. See [Karlsson v. Rabinowitz, 318 F.2d](#)

666, 668–69 (4th Cir.1963) (upholding service upon the defendant’s wife at a home to which the defendant never intended to return).

Service of Process

In a case in which the district court permits the plaintiff to file *in forma pauperis* (“IFP”), the district court must direct the United States Marshals Service to effectuate service of process. 28 U.S.C. § 1915(d); Fed.R.Civ.P. 4(c)(3); see *Robinson v. Clipse*, 602 F.3d 605, 608 (4th Cir.2010) (“*In forma pauperis* plaintiffs must rely on the district court and the U.S. Marshals Service to effect service of process according to 28 U.S.C. § 1915.”). However, the plaintiff must provide sufficient information to locate the defendant with “reasonable effort.” *Richardson v. Johnson*, 598 F.3d 734, 738–40 (11th Cir.2010); see also *Graham v. Satkoski*, 51 F.3d 710, 713 (7th Cir.1995) (“If the Marshals Service could have obtained the new addresses of the defendants with reasonable efforts, the marshals’ failure to serve process was ‘good cause’ for purposes of [Fed.R.Civ.P.] 4(m),” excusing the plaintiff’s failure to timely serve the defendants.); *Greene v. Holloway*, 210 F.3d 361, 2000 WL 296314, at *1 (4th Cir.2000) (unpublished table opinion) (reversing district court’s decision that service was insufficient after prisoner argued he did all that was required under *Graham* to effect service).

DISCUSSION

*2 Dommers asserts that this case should be dismissed because service was made by the Marshal’s service on April 13, 2011 upon a hospital administrator who was not authorized to accept service on Dommer’s behalf. [Doc. 68.]

The Court has the discretion to dismiss a case under Rule 12(b) (5) for insufficiency of service. *Reinhold v. Tisdale*, 2007 WL 2156661 at *3 (D.S.C.2007) (unpublished opinion) (citing *Dimensional Comm’ns, Inc. v. OZ Optics*,

Ltd., 218 F.Supp.2d 653, 655 (D.N.J.2002)). “Ordinarily, dismissal is proper when there is prejudice to the defendant or where proper service is unlikely to be accomplished.” *Id.* (citing *Curcuruto v. Cheshire*, 864 F.Supp. 1410, 1411 (S.D.Ga.1994)). However, absent prejudice to the defendant and when service can be accomplished, courts generally will quash the insufficient service and allow a plaintiff to perfect service. *Id.*

Because Plaintiff has been granted IFP status in this case, service requirements fall to the U.S. Marshal’s Service, which must expend a reasonable investigative effort to locate a defendant once the defendant is properly identified. See *Richardson*, 598 F.3d at 738–40; *Greene*, 210 F.3d 361, 2000 WL 296314, at *1; *Graham*, 51 F.3d at 713. Dommers has failed to show how he would be prejudiced by quashing the insufficient service or why service can not be completed pursuant to Rule 4. Therefore, the Court finds Dommers’s motion to dismiss pursuant to Rule 12(b)(5) should be denied, with service to be perfected by the United States Marshals Service.

CONCLUSION

Based on the foregoing, it is recommended that Defendant’s motion to dismiss be DENIED. Defense counsel for Dommers should advise the Court in writing within the time period for filing objections to this Report and Recommendation as to whether he is authorized to accept service on behalf of this defendant. If defense counsel advises the Court that he is not so authorized, then a separate order should be issued directing the United States Marshal to personally serve Dommers at his place of business or residence.

IT IS SO RECOMMENDED.

All Citations

Not Reported in F.Supp.2d, 2011 WL 2198298

Footnotes

- 1 Because Plaintiff is relying on service of process by the Marshal’s service pursuant to 28 U.S.C. § 1915, the Court will not wait on a response from Plaintiff regarding the sufficiency of service in this matter.

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